1998

The City of Orem v. Dwane J. Sykes : Brief of Appellant

Utah Court of Appeals

Robert Church; Attorney for Apppellee.
Randy M. Lish; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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The City of Orem,	:	Appellate No. 981415-CA
Plaintiff,	:	
	:	Trial Court No. 971-1214
vs.	:	
Dwane J. Sykes,	:	Priority No. 2
Defendant.	:	

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BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF GUILTY DATED JUNE 22, 1998, ENTERED BY THE HONORABLE JOHN C. BACKLUND, FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, OREM DEPARTMENT

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78-2(a)-3(2)(d) and (f) (1953, as amended).

STATEMENT OF THE ISSUES

A. Did the Trial Court reach its decision based on facts not in evidence, leading to incorrect interpretations of other facts?

Standard of Review: The decision as to what evidence was actually presented is a matter of law. In reviewing a trial court's determination of a question of law, the appellate court reviews the decision for correctness and affords no deference to the trial court. Provo River Water Users' Assoc. vs. Morgan, 857 P.2d 927, 931 (Utah, 1993).

2. Did the trial court improperly admit into evidence hearsay statements?

Standard of Review: The decision as to whether evidence is hearsay is presented as a matter of law. In reviewing a trial court's determination of a question of law, the appellate court reviews the decision for correctness and affords no deference to the trial court. Provo River Water Users' Assoc. v. Morgan, 857 P.2d 927, 931 (Utah, 1993).

3. Did the Court improperly deny the admission of Defendant's evidence, thereby preventing Defendant from putting on a defense?

Standard of Review: The decision as to whether evidence is hearsay is presented as a matter of law. In reviewing a trial court's determination of a question of law, the appellate court reviews the decision for correctness and affords no deference to the trial court. Provo River Water Users' Assoc. v. Morgan, 857 P.2d 927, 931 (Utah, 1993).

Standard of Review:

4. Did the City meet its burden of proving the Defendant guilty beyond a reasonable doubt?

Standard of Review: The decision as to whether evidence is hearsay is presented as a matter of law. In reviewing a trial court's determination of a question of law, the appellate court reviews the decision for correctness and affords no deference to the trial court. Provo River Water Users' Assoc. v. Morgan, 857 P.2d 927, 931 (Utah, 1993).

5. Did Defendant's trial attorney provide ineffective assistance such that Defendant was denied his right to effective assistance of counsel?

Standard of Review: The decision as to whether evidence is hearsay is presented as a matter of law. In reviewing a trial court's determination of a question of law, the appellate court reviews the decision for correctness and affords no deference to the trial court. Provo River Water Users' Assoc. v. Morgan, 857 P.2d 927, 931 (Utah, 1993).

STATEMENT OF FACTS

The parties' versions of the facts of what occurred on July 30, 1997 are very different. Defendant testified that he allowed the alleged victim, Priscilla Anderson, to rent from him an apartment in his basement. Initially, the rental period was to be only for a few days, but Ms. Anderson ultimately stayed for over three months.

On the night of July 29, 1997, Defendant was irrigating the acreage around his house. His water turn began at 11:40 a.m. of the 29th of July. Defendant's wife had recently had surgery, and Defendant was spending most of his time that day caring for her and monitoring the irrigation. Late in the evening, he decided to go to a movie at the theater located behind his house. Because he had been irrigating, Defendant was wearing sandals. Defendant had earlier served Ms. Anderson with at least three eviction notices, but had been

unable to locate Ms. Anderson to talk to her about her moving out of the apartment.

On his way back from the movie, Defendant saw Ms. Anderson's children in a car in the driveway by the house. After being told that she was at home, Defendant went down the outside stairs to try to talk to Ms. Anderson. He could see Ms. Anderson sleeping on the couch through the sliding-glass door; after several minutes of knocking and the dog barking, Ms. Anderson finally woke up. As soon as she saw Defendant, she got up and lurched to the door, and after opening the door, started attacking Defendant and cursing at him for calling the police on her for abandoning her children. Defendant pushed Ms. Anderson away from him, and backed up to a tree about 30 feet away from the door. Ms. Anderson kept coming at Defendant all while he was backing up, and her little dog was nipping at Defendant's feet. At one point, the dog actually bit Defendant, who then picked up the dog, telling Ms. Anderson that he was going to take the dog to the pound so it could be put under observation for a few days to determine if it had rabies. Throughout this time, Ms. Anderson continued to attack Defendant. He finally was able to get up the hill to where the garage was and put the dog in

the garage and close the door. Contrary to Ms. Anderson's allegations, Defendant never threatened to kill the dog. Rather, Defendant told Ms. Anderson that she could pick her dog up in 10 days, after the quarantine period had run to determine if it had rabies. Further, during the struggle with Ms. Anderson, the Defendant's glasses were knocked off his face. Defendant found by the tree in his driveway the next morning, broken.

SUMMARY OF ARGUMENT

The Court found the Defendant guilty of the assault, choosing to believe in whole the testimony of Ms. Anderson, and giving no credit whatsoever to the testimony of Mr. Sykes. However, the Court misunderstood some of the evidence, improperly refused to admit some of the evidence which would have supported Defendant's claims, and improperly admitted evidence on behalf of Ms. Anderson and the City. Further, at trial, Defendant discovered that the City had in its possession documents which had been subpoenaed, but not produced in response to a subpoena duces tecum. Finally, Defendant claims that his trial counsel was ineffective in providing assistance.

ARGUMENT

I. THE TRIAL COURT REACHED ITS DECISION BASED ON FACTS OTHER THAN THOSE INTRODUCED AS EVIDENCE; ITS WHOLE DECISION WAS BASED ON INCORRECT FACTS.

The Trial Court completely misinterpreted some facts put in evidence, and did not understand other facts. One of the most telling problems with the Trial court's findings is its statement that the testimony of Al Loris was compelling. The Court stated "Sometimes a long case can turn on some very short evidence...In this case I thought the testimony of Al Loris was essentially compelling...It's the very next day, August 1st." (Tr. 211). The problem is that the incident occurred on the evening of July 29th and the early morning of July 30th. The Court very obviously misunderstood Mr. Sykes' testimony that he took the dog to a private kennel, and to the pound two days later. The Court bases this conclusion on Al Loris's testimony that, according to his own notes, Mr. Sykes brought the dog in at 7:30 on the 1st of August. However, not only does this completely contradict Mr. Sykes' testimony, it does not make any sense. Mrs. Anderson testified that the incident occurred on July 29th and 30th, and not August 1, as understood by the Court.

The Trial Court mis-cited the date on the back of the photos introduced by Defendant as being taken on August 1, even though the date on the back of each one is July 30, 1997. This is important because, again, the Court used the discrepancy in dates as one basis for discounting all of Defendant's testimony. The Trial Court found that the dated photos introduced by Defendant to show that Mrs. Anderson had moved out did not make any sense because they were dated the same day he took the dog to Officer Loris.

The Court also states that another concern of his was that the dog died five days after being taken to the pound. (Tr. 213). The Court's whole colloquy is to the effect that the dog would not have died so soon if all Mr. Sykes did was hold it by the scruff of the neck. However, the evidence was that the dog died on August 9th, and died because it was euthanized. There is no evidence that the dog died of anything that Mr. Sykes did or did not do. Mr. Loris testified that the dog was euthanized on the 9th. (Tr. 72). Interestingly, this would be 8 days from the date which Mr. Sykes claims to have took the dog to the pound, and 10 days from which Mr. Sykes took the dog to the private kennel, and which the Court said was wrong, because of Mr. Loris' notes.

Based on the testimony of Mr. Loris, it is much more likely that Mr. Sykes' testimony was correct--he took the dog to the pound on August 1st, and the pound euthanized it on August 9th. Why the pound did so is open to speculation--the City would have us believe that it was because the dog was sick, and the Court agreed. However, it should be noted that it was not, according to Mr. Loris's own testimony, put down until after what was logically the end of the 10 day quarantine period.

These points are important because the Court discounts Mr. Sykes testimony because it believes he is lying. The Court stated at the beginning of its decision

> "One of the instructions we give juries, 'If you find that a witness has testified falsely as to a material fact, you may, but are not obliged to, disregard all of the testimony of that witness.' In this case I thought the testimony of Officer Al Loris was essentially compelling... It's the very next day, August 1." (Tr. 210).

Because it misunderstood the facts presented into evidence, the Court decided that Defendant was lying, and all of decided that all of Defendant's testimony should be discounted. However, the Court reached its conclusion on false premises. Mr. Sykes was not lying about what happened. The City's own evidence shows that what Mr. Sykes testified to is really what likely happened. The Court indicated that

another reason that it did not believe Mr. Sykes' testimony was that the whole incident just couldn't have occurred as he said if his water turn started at 11:40 p.m. (Tr. 215, 216). However, the record is explicit that the Defendant's water turn started at 11:40 a.m. (Tr. 180, 196, 197). Based on the testimony, which was uncontroverted, Mr. Sykes' time frame was very workable. However, because the Court believed that Mr. Sykes was lying because it misunderstood these facts, it completely discounted the rest of Mr. Sykes' testimony.

Very clearly, the Court based its decision on the wrong facts, facts which were not what was introduced by any witness. Had the Court correctly understood the facts as testified to by even the City's witnesses, it would have to reconsider its decision, based on its own statements.

II. DID THE COURT IMPROPERLY ADMIT HEARSAY EVIDENCE?

It has long been a rule of evidence that hearsay evidence, because of its inherent unreliability, is not admissible in court. This is clearly stated in URE §802. Even though there are numerous exceptions to this rule, a court is still not allowed to admit into evidence hearsay testimony, unless the party trying to get it admitted can show that it fits within one of the exceptions. Utah Rule of Evidence §802

states "Hearsay is not admissible except as provided by law or by these rules." The Court, over repeated objections (Tr. 82, 83), allowed Officer Carter to testify that the police dispatcher told him that the dispatcher had telephoned the Sykes residence immediately after taking the call about the altercation, and spoken with a female who said she was Mrs. Sykes. Very clearly, this is hearsay. The dispatcher was not present to testify about her conversation, nor to be cross-examined about how she had identified the female who answered the phone as Mrs. Sykes.

This admittance of hearsay is important because the Trial Court later used it to justify, in part, its finding that Defendant was guilty. The Court stated that Mrs. Sykes had been lucid enough to answer the phone, but never answered the door, and that clearly what occurred was that Mr. Sykes was not out irrigating, as he testified, but was in the house, told his wife to hang up the phone, and that refused to talk to the police. (Tr. 217). The Court refused to allow Defendant to introduce evidence that Mrs. Sykes had denied ever answering the phone that night, and that the female was probably someone in the basement apartment where a phone jack to the upstairs phone remained. But, the Court did allow the

hearsay evidence about the whole conversation. The prosecution made no attempt to claim that the testimony fell within one of the exceptions to the hearsay rule, and the whole conversation should have been excluded. Instead, the Court relied in part on this hearsay testimony to decide that Defendant was not being truthful, and therefore discounted all of the testimony of Defendant.

In State v. Long, 721 P. 2d 483 (Utah 1986), the Utah Supreme Court stated that the hearsay rule has as its declared purpose the exclusion of evidence not subject to cross-examination concerning the truthfulness of the matters asserted. This case is the epitome of why the rule exists. Defendant should have had the opportunity to challenge the accuracy of what was said, to determine how the dispatcher knew whom she was talking to over the phone. Instead, the prosecution was able to use the hearsay to sway the Court's opinion of the veracity of all of Defendant's testimony. Very clearly, Officer Carter's testimony about the phone conversation should not have been allowed, nor should it have been relied on by the Court.

III. THE PROSECUTOR IMPROPERLY WITHHELD KEY DOCUMENTS FROM DEFENDANT WHICH HAD BEEN REQUESTED PURSUANT TO DISCOVERY.

Attached as Exhibit "A" is Defendant's Subpoena Duces

Tecum to the Orem City Police Department. The two returns of service show that it was served Sept. 4, 1997 on both locations of relevant police records, i.e., served personally on Officer Albert Loris, Director of the Orem Police Animal Pound, and served personally on the Orem Police Records Secretary. This subpoena duces tecum is comprehensive and clear in its requirement:

> ... in the above entitled action... copies of all police files, dates, times, witness statements, police notes, reports, comments, records, documents, etc.... Include all police records and computer entries and printouts obtainable regarding Dwane Sykes and Priscilla Anderson during 1997.

Despite this very clearly broad subpoena, Officer Loris intentionally refused and failed to produce certain documents which he later used at trial., because they were not spelled out by name. The following documents were not produced by Officer Loris, despite the subpoena duces tecum very clearly stated that they should be produced: Police dog pound intake card; handwritten police complaint entry log dated 7/30/97; $20 Ribbonwood Kennel Receipt & Defendant's $20 check; and Officer Loris' dog delivery receipt to Sykes. Each of the documents withheld from Defendant was an issue raised by the Trial Court in determining that Defendant was not being honest with the Court, and therefore resulted in Defendant's

testimony being discounted. The Utah Rules of Criminal Procedure very clearly state that the prosecutor is "shall" produce any and all evidence which tends to mitigate the guilt of the Defendant. URCrP 16(a). In the present case, the Defendant very clearly subpoenaed these documents, and Officer Loris intentionally, by his own testimony, failed to produce these documents. By doing so, the prosecution interfered with the preparation and presentation of its defense. The prosecution obviously felt that these documents were important, as it showed when it used these documents at trial. However, the prosecution should not have been allowed to introduce or use any documents which had been requested but not produced. The documents which Defendant is most concerned about are the card on which Officer Loris' notes were contained; the numerous written reports which Defendant filed with the police department regarding the incident; and records of the police department that showed that Defendant actually did call the department several times regarding the incident.

IV. DID THE PROSECUTION FAIL TO PROVE GUILT BEYOND A REASONABLE DOUBT?

The standard that the prosecution must meet in order to show a Defendant guilty is proof beyond a reasonable doubt. In the present case, there is most definitely a question about

whether the prosecution met its burden, based on the points raised above. It should be noted again that the Court, in order to find Defendant guilty, had to discount completely Defendant's testimony, for what have been shown to be spurious reasons. Further, the Court had to rely on facts other than those presented as evidence by either side. This clearly shows that the prosecution did not meet its burden, and but for the incorrect facts relied on by the Court, the Defendant could not have been found guilty of any of the charges.

It is particularly important that the Court, in finding the Defendant guilty of the assault charge, completely ignored Defendant's testimony that Mrs. Anderson was the one who awoke angry, and actually charged at Defendant. The Court, by its own statement, ignored Defendant's testimony because it found he had lied about much of what had happened. The Court found that Defendant was lying because of the facts on which it decided to rely. However, as shown above, those facts were not introduced into evidence, nor shown by the evidence that was admitted. Defendant believes that, based on the Court's own statements, had the Court understood the evidence correctly and relied on what was actually introduced, it could not have decided that Defendant was lying and totally

discounted his testimony. Further, had the Court not found the Defendant had lied, the Court could not have found him guilty because there was substantial evidence to support many of his claims he testified to.

V. DID DEFENDANT'S TRIAL ATTORNEY PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL?

The Sixth Amendment to the U.S. Constitution provides " In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of counsel for his defence." Article I, §12 of the Utah Constitution also provides "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." It is also very clear from an abundance of case law that in order to protect an individual's constitutional right to legal counsel, the counsel that a defendant receives must be "effective". The issue then becomes one of what constitutes "effective" assistance of counsel.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), the U.S. Supreme Court outlined the standard that must be met by a defendant to establish the ineffective assistance of counsel. The Court stated that the proper standard was that the Defendant had to show that, but

for the counsel's errors, the result of the proceeding would have been different.

In the present case, the Defendant believes he received ineffective assistance of counsel, under both the U. S. and Utah Constitutions, for several reasons. First, despite the Defendant's request that his attorney request a jury trial, his attorney insisted on trying the case to the bench, with the obvious result of the Defendant's conviction. Second, Defendant's trial counsel failed to object to numerous instances of hearsay evidence being presented, and admitted. Third, trial counsel failed to properly cross-examine at least one witness, Al Loris, when it was clear that there were very clear discrepancies in his testimony. Fourth, Defendant's trial counsel failed to provide notice as required by law of his intent to use an expert witness, who was then not allowed to testify. Based on the cumulative effect of these lapses, Defendant did not receive effective assistance of counsel.

In his closing statements, the Judge very clearly stated that part of the reason he was discounting most, if not all, of the Defendant's testimony was because it did not coincide with the testimony of Al Loris, whom the Court considered to be the prosecution's most telling witness. (Tr. 211).

However, had Defendant's trial counsel adequately cross-examined Mr. Loris, he could have established that the time frame outlined by Mr. Loris did not make any sense, in light of when the rest of the incident occurred. Based on Mr. Loris' testimony, the court had to assume that the dog pound proceeded to put the dog to sleep within five days of its being brought in, contrary to its own guidelines. It is obvious that there was a very serious discrepancy in the evidence and the time frame in which each event of the incident occurred. Defendant's trial counsel should have taken great pains to make clear the time at which everything occurred. Instead, he left it up to the Court to try and figure out how to resolve the discrepancies. The Court chose to do so by disbelieving everything the Defendant testified to, no matter how incredulous the resulting interpretation. Based on the Court's statement on how it arrived at its decision, had Defendant's counsel adequately shown the problems with Mr. Loris' testimony, the Court may very well have decided the case differently. The Court would have had no reason to discount most, if not all, of Defendant's testimony, and Defendant's testimony would have been in fact

corroborated by the testimony of the only truly independent witness to testify.

Defendant's counsel also failed to object to most of the hearsay testimony offered by the prosecution; again, this shows that counsel was ineffective. Had the Court been forced to rule on the hearsay evidence that was presented, it may well have been forced, and wanted, to rely more on Defendant's testimony than it obviously did.

The third instance showing that Defendant received ineffective assistance of counsel is shown by trial counsel's failure to file the notice of appeal. It is a matter of record that Defendant filed his own notice of appeal, and many of the subsequent documents. Immediately after the trial, Defendant asked his attorney to file a notice of appeal; even after repeated requests to do so, Defendant's trial counsel to do so, and Defendant ultimately had file his own notice, in order to preserve his right to appeal. Defendant should not have been forced to file his own notice of appeal in order to preserve his right to have the trial court's decision reviewed.

CONCLUSION

As can be seen from the above, there were numerous errors in the trial of Defendant, the cumulative effect of which justifies a new trial. Defendant was obviously found guilty based on facts which were not presented as evidence by either party, at least as stated by the Court; hearsay evidence, which became in part the basis for the finding of guilt, was admitted over the objection of Defendant's attorney; the prosecution did not prove guilt beyond a reasonable doubt, as shown by the Court's reliance on facts which were not ever presented by either party; key documents, which were requested by Defendant through a subpoena duces tecum, were withheld, intentionally, by the prosecution and police; and Defendant's trial counsel was ineffective, as shown by his lack of knowledge of criminal procedure and his failure to file the request for a new trial or notice of appeal. As noted earlier, the cumulative effect of these errors deprived Defendant of a fair hearing as guaranteed by both the U.S. and Utah Constitutions. Accordingly, the case should be remanded for a new trial.

DATED this 26th day of August, 1999.

Randy M. Lish

Randy M. Lish
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 1999, I mailed a true and correct copy of the foregoing Brief of Appellant to Robert Church, Orem City Prosecutor, 97 E. Center, Orem, UT 84057.

Randy M. Luis

ADDENDUM

DISTRICT

4TH ~~CIRCUIT~~ COURT, STATE OF UTAH
UTAH COUNTY, OREM DEPARTMENT

CITY OF OREM,

Plaintiff

SUBPOENA
DUCES TECUM

vs.

DWANE J. SYKES
1511 South Carterville Rd.
Orem, Utah 84097

~~XXXXXXXX~~

Criminal No.
971-1214

Defendant(s)
(include address and DOB)

THE STATE OF UTAH TO:

(Name)	*(Address)*	*(Date Served)*
OREM CITY, POLICE,RECORDS DIVISION	Orem City Bldg. St & Center St.	Sept. 4, 1997

4:50 pm

YOU ARE COMMANDED to appear and give testimony in the above-entitled action before the above court at the following time and place: to produce copies of all police case files, dat
s, witness statements, police notes, reports, comments, records, documents, per attached pa

Date Time
Hand- Delivery immediately upon receipt, with any copies not immediately available promptly mailed to:
Place
Dwane Sykes, 1511 South Carterville Rd., Orem, Utah 84097-7244 (ph. 225-0

YOU ARE FURTHER COMMANDED to bring with you the following papers, documents, or other items: see above and attached pages. Include all police records and computer entr
its obtainable regarding Dwane Sykes and Pricillia Anderson during 1997.
If you fail to obey this subpoena, the court may issue a warrant for your arrest.

Date Sept. 3, 1997

Circuit Judge or Clerk or County Attorney

INSTRUCTIONS TO WITNESS

To receive payment of your witness fee and mileage: (1) bring this subpoena with you to court, (2) present the subpoena to clerk of the court, and (3) sign the witness book. Payment will be mailed to you.

SP AE-0219